Filed 12/30/08 John v. Personnel Commission of the Los Angeles Unified School Dist. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALEYAMMA JOHN, Plaintiff and Appellant, v. PERSONNEL COMMISSION OF LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B204070 (Los Angeles County Super. Ct. No. BS103315)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dzintras Janavs, Judge. Affirmed.

Aleyamma John, in pro. per., for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Mary Dowell, Arlin B. Kachalia for Defendant and Respondent.

Plaintiff and appellant Aleyamma John (John), in propria persona, appeals a judgment denying her petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.)[1] The petition sought to overturn a decision by defendant and respondent Los Angeles Unified School District (the District) suspending John for three days without pay for discourteous treatment of her supervisor.

We perceive no error in the trial court's decision upholding the District's decision and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

John was a permanent classified employee assigned as a paralegal to the Office of General Counsel at the District.

1. *Summary of administrative proceedings.*

On September 15, 2004, the District served John with a notice that she would be suspended for 10 working days based upon various causes, including: insubordination or willful disobedience; inattention to or dereliction of duty; and discourteous, abusive or threatening treatment of the public, employees or students. Said causes were based upon 20 separate charges, including, as relevant to this appeal, Charge No. 7, to wit: "On or about June 15, 2004, Ms. John sent electronic mail to Ms. Verdugo [her supervisor] which: [¶] a. Stated, '*entrapment is the style of management you choose*.' [¶] b. Accused [Verdugo] of, '*dishonest manipulations of our conversations*.' " (Italics added.)

John promptly appealed the disciplinary action to the District's Personnel Commission (the Commission). The matter was heard by a hearing officer over a four-day period.

On December 12, 2005, the hearing officer issued a 61-page recommended decision. In summary, the hearing officer found "the record supports Charge 7 and thus establishes that the District had reasonable cause to discipline [John] for

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[1] All statutory references are to the Code of Civil Procedure, unless otherwise specified.

'discourteous treatment' of her supervisor, a cause drawn from Personnel Commission Rule 902A. The record fails to establish that the District had reasonable cause to discipline [John] based on the other charges set forth in the Statement of Charges." The hearing officer recommended the 10-day suspension be rescinded and expunged from John's personnel records, that John be disciplined via a three-day suspension based on Charge No. 7, and that the District award John the difference in pay between a 10-day suspension and a 3-day suspension.

On April 12, 2006, the Commission adopted the hearing officer's decision as its decision in the case.

2. *Trial court proceedings.*

On May 24, 2006, John, in propria persona, filed a petition for writ of administrative mandate (§ 1094.5) seeking to overturn the District's decision. John contended the District's decision with respect to Charge No. 7 (e.g., that the emails to her supervisors were discourteous) was not supported by the weight of the evidence, and that the penalty of a three-day suspension was excessive as a matter of law. John waited over a year, until June 1, 2007, to serve the petition upon the District.

In its opposition, the District contended the petition was barred by laches, and in any event, the Commission properly found that John engaged in discourteous conduct towards her supervisor, and that John's conduct warranted a three-day suspension without pay.

a. *Trial court's ruling.*

On October 19, 2007, the trial court denied John's petition for writ of administrative mandate.

The trial court rejected the District's laches argument, finding the District had failed to show it suffered any prejudice as a consequence of John's one-year delay in serving the petition.

As for the merits, the trial court rejected John's contention that because the hearing officer overturned all but one charge, that it was per se an abuse of discretion to sustain Charge No. 7. While the other charges "were found to be insufficiently based, the hearing officer determined that Charge No. 7 is supported by the weight of the evidence. Such finding was not an abuse of discretion."

The trial court rejected John's contention that the adverse finding as to Charge No. 7 was contradicted by the finding on Charge No. 5, on which John prevailed. Charge No. 5 was based on the following statements: "moving is not in my job description"; John did not feel she had received sufficient "legitimate reasons to move"; and "it is not in my job description to move items from point A to point B." The trial court reasoned that unlike the language in the emails in Charge No. 7, these statements were merely declarative and did not disparage Verdugo's character.

The trial court also rejected John's contention there was no evidence from any witnesses that the email in Charge No. 7 was discourteous. The trial court ruled there was no requirement for witness testimony to establish discourteousness and that the emails were sufficient to establish John was discourteous to Verdugo. The trial court cited John's admission during the proceedings that the language was disrespectful, and it concluded the finding on Charge No. 7 was supported by the weight of the evidence.

The trial court further rejected John's contention she was treated differently from other employees with respect to time card management and attendance. The trial court noted all those charges against John were dismissed and any discussion of disparate treatment would be " 'largely academic.' "

With respect to the level of discipline, the trial court found the three-day suspension fell well within the parameters and there was nothing to indicate a manifest abuse of discretion.

On November 15, 2007, John filed a timely notice of appeal from the judgment denying her petition for writ of administrative mandate.[2]

CONTENTIONS

John contends: her email to her supervisor about her employment conditions and accusing the supervisor of entrapment was protected speech; the trial court failed to exercise its independent judgment in reviewing the matter; neither the trial court nor the hearing officer bridged the analytic gap between the evidence and their respective decisions; the District's practice of hiring hearing officers on a case-by-case basis denied her a fair hearing; the trial court refused to address the intent behind the District's abusive actions towards her; and she was denied a fair trial because Judge Janavs was biased against her.

DISCUSSION

1. *John's email to her supervisor was not protected speech.*

John contends her email to her supervisor regarding her employment conditions and accusing her employer of "entrapment" was protected speech. The argument fails.

"[W]hile the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.' [Citation.]" (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 420 [164 L.Ed.2d 689].) The United States Supreme Court has identified "two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. *The first requires determining whether the employee spoke as a citizen on a matter of public concern.* [Citation.] *If the answer is no, the employee has no*

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[2] During the course of the administrative mandamus proceedings, John was terminated from the District. John filed another petition for writ of mandate, this time challenging the termination of her employment. The trial court dismissed that petition. John appealed that dismissal. That appeal is currently pending (No. B209701) but is outside the scope of this appeal, which relates solely to the three-day suspension without pay.

First Amendment cause of action based on his or her employer's reaction to the speech. [Citation.] If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (*Id*. at p. 418, italics added.)

Here, the Commission suspended John for three days for making discourteous statements to her supervisor. Those statements were not constitutionally protected speech for two reasons: John was speaking not as a citizen but in her capacity as an employee of the District; and John was not speaking on a matter of public concern. Indeed, in her papers below, John characterized the communication as "a private email to her supervisor."

We conclude the trial court properly rejected John's protected speech claim.

2. *No merit to contention the trial court failed to exercise its independent judgment on the evidence.*

It is rudimentary that " '[i]f the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence.' [Citations.]" (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 51.)

John contends "*while Judge Janavs was aware that her 'scope of review' was independent* . . . she did not realize the great freedom such scope gives the Court to right any wrongs and provide equity." (Italics added.)

Thus, John concedes Judge Janavs was mindful that the independent judgment standard was applicable. John's assertion this seasoned trial judge was unaware of her "extensive powers of review" in exercising her independent judgment on the evidence (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45) is speculative and is summarily rejected.

3. *No merit to contention there was a failure to bridge the analytic gap between the evidence and the ultimate decision*.

As stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, "implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . By focusing . . . upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route."

John contends neither the trial court nor the hearing officer bridged the analytic gap between the evidence and their respective decisions for a reasonable person to come to the conclusion that the email sent by John to Verdugo was sufficient to support a charge of discourteousness as alleged in the statement of charges. The contention lacks merit.

We agree with the trial court that irrespective of the absence of any opinion testimony to establish discourteousness, the email itself is sufficient to establish that John was discourteous to her supervisor by accusing Verdugo of "dishonest manipulations" and "entrapment." Further, as the trial court noted, John admitted during the proceedings that her language was disrespectful. Therefore, we reject John's assertion there was a failure to bridge the analytic gap between the evidence and the ultimate decision.

4. *No merit to John's contention the District's procedure in selecting a hearing officer denied her a fair trial*.

Citing *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1029 (*Haas*), John contends the District's practice of hiring hearing officers on a case-by-case basis violates due process because the hearing officers may be tempted to rule in favor of the agency to be hired again in the future. *Haas* is clearly inapposite and John's reliance thereon is misplaced.

Haas held "a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." (*Haas, supra*, 27 Cal.4th at p. 1024.)

Haas is unavailing to John because the District does not unilaterally select hearing officers on a case-by-case basis. The Commission's procedures have established a pool of hearing officers who are selected "based on the quality of their training and experience while recognizing the desirability of reflecting the cultural diversity of the Los Angeles community and the staff of the District." (L.A. Unified Sch. Dist. Personnel Comm. Rules (hereafter rules), rule 904(E).) Further, the Commission utilizes a computerized random-number selection system which selects the names of three hearing officers. The list of three is submitted to the representative of the appellant and the representative of the District. The opportunity to strike one name of three from the list allows each representative to disqualify whichever hearing officer he or she believes is the least favorable.

The process used by the Commission herein is similar to one approved by *Haas*. (*Haas, supra*, 27 Cal.4th at p. 1037 [establishing office of county hearing officer would avoid problem of ad hoc selection of adjudicator].) There was no due process violation in the selection of the instant hearing officer.[3]

5. *No merit to contention the trial court erred in not addressing the intent behind the District's actions toward John.*

In this regard, the trial court ruled: "[John's] contentions that she was treated differently from other employees with respect to issues relating to time card management and attendance matters have no bearing on [John's] suspension based on her discourteous emails to her supervisor. While it might have been an issue as to other charges, all other charges against [John] were dismissed. The hearing officer appropriately noted that, 'In view of the fact that most of the charges have not been sustained, any discussion of whether [John] was disparately treated . . . would be largely academic.' "

We are mindful the sole charge before the trial court was Charge No. 7, the only charge which was sustained. The issue before the trial court was whether the District had reasonable cause to discipline John for discourteous treatment of her supervisor, a cause drawn from rule 902(A). In view of the express language of the emails, i.e., accusing Verdugo of "entrapment" and "dishonest manipulations," and John's admission that the language was disrespectful, the trial court properly found the weight of the evidence supported the decision sustaining Charge No. 7. Because the other charges against John were dismissed, and in view of the narrow issue before the trial court with respect to Charge No. 7, the trial court properly found John's allegations of disparate treatment were academic and had no bearing on whether Charge No. 7 was supported by the weight of the evidence.

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3 We further observe the hearing officer's decision overturning all but one of the charges against John undermines John's claim the hearing officer was biased against her.

6. *No merit to claim of judicial bias.*

Lastly, John contends Judge Janavs's refusal to address the improper intent behind the District's "abusive" disciplinary actions against her are indicative of judicial bias and should have caused Judge Janavs to recuse herself. The contention fails.

A trial court's "numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

In any event, if John believed Judge Janavs was biased against her, John's remedy would have been to file a peremptory challenge or a challenge for cause. Thereafter, a petition for writ of mandate pursuant to section 170.3, subd. (d), is the exclusive means by which a party may seek review of an unsuccessful peremptory challenge against a trial judge (§ 170.6), or an unsuccessful challenge for cause (§ 170.1). (*People v. Hull* (1991) 1 Cal.4th 266, 273-274; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:259.3, p. 2-121.)

Accordingly, John's contention regarding judicial bias is not properly presented in this appeal.[4]

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[4] It is not until the reply brief that John sets forth her argument that a three-day suspension was an excessive penalty for sending the offending email to her supervisor. Therefore, the contention is waived. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

DISPOSITION

The judgment denying the petition for writ of administrative mandate is affirmed. The District shall recover its costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.